IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT MARTINOLICH :

:

Petitioner, : CIVIL ACTION

NO. 03-4509

BEN VARNER, et al.

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Respondents.

MEMORANDUM

Baylson, J. August , 2006

I. <u>Introduction</u>

Pursuant to 28 U.S.C. § 2254, Petitioner Robert Martinolich ("Petitioner" or "Martinolich") filed a pro se Petition for Habeas Corpus in this Court on August 27, 2003. The Court referred the case to Chief United States Magistrate Judge James R. Melinson (the "Magistrate Judge"), and on March 2, 2004 the Magistrate Judge issued a Report and Recommendation ("R&R") (Doc. No. 7) pursuant to 28 U.S.C. § 636(b)(1)(C), suggesting that the petition be denied with prejudice. Petitioner filed a response listing various objections to the R&R (Doc. No. 8) on March 10, 2004. Due to a change in counsel of record at the Berks County District Attorney's Office, the Court granted the Respondent an extension of time to file a brief in opposition to Petitioner's objections. The Court's order placed the case in the civil suspense file until the relevant briefing was completed. The Respondent filed its brief in opposition to Petitioner's objections on October 13, 2004 (Doc. No. 13). However, neither party moved for the case to be restored to the Court's active docket. This resulted in an unfortunate delay. On

June 15, 2006, the Respondent moved to restore the case to the Court's active docket. The Court granted the motion on June 21, 2006. Subsequently, on July 3, 2006, Petitioner filed a Petition to Reconsider Appointment of Counsel Pursuant to Section 1915(d) (Doc. No. 17).

Upon independent and thorough consideration of the record and all court filings in this Court, and for the reasons that follow, (1) Petitioner's objections are overruled and the recommendations by the Magistrate Judge are accepted and (2) the Court will deny the petition to reconsider appointment of counsel.

II. <u>Background and Procedural History</u>

After a jury trial in the Court of Common Pleas of Berks County, Martinolich was found guilty of first degree murder on June 12, 1970, and was sentenced to life imprisonment on February 22, 1973. The Supreme Court of Pennsylvania affirmed his judgment of sentence by an order dated March 25, 1974. See Commonwealth v. Martinolich, 318 A.2d 680 (Pa. 1974). On December 16, 1974, the United States Supreme Court denied Martinolich's writ of *certiorari*. See Martinolich v. Pennsylvania, 419 U.S. 1065 (1974). Martinolich is currently serving his sentence at SCI-Smithfield in Huntingdon, Pennsylvania.

On July 3, 1995, Petitioner filed a <u>pro se</u> petition for collateral relief under the Post Conviction Relief Act ("PCRA") raising the same claims alleged in sections 12A, 12B and 12C of the instant habeas petition. After appointing counsel to assist Petitioner with his request for relief, and holding an evidentiary hearing on August 12, 1997, the PCRA Court denied relief on October 28, 1997.

The petitioner requested leave to appeal <u>nunc pro tunc</u> from the PCRA Court's denial of relief on November 13, 2000, which was granted on January 17, 2001. The PCRA court appointed Gail Chiodo, Esq., to represent Petitioner on appeal from the denial of his PCRA

Commonwealth v. Finley, 550 A.2d 213 (Pa. Super 1988), to support her request to withdraw as Petitioner's counsel. In response, Petitioner filed a <u>pro se</u> brief which included the same allegations of ineffective assistance of counsel raised in sections 12A, 12B and 12C of the instant habeas petition. The Superior Court of Pennsylvania affirmed the PCRA court's denial of relief on April 15, 2002, granting Ms. Chiodo's request to withdraw as counsel of record for Petitioner. See Commonwealth v. Martinolich, 321 MDA 2001 (Pa. Super. 2002). On August 14, 2002 the Supreme Court of Pennsylvania denied Petitioner's request for allowance of appeal. Commonwealth v. Martinolich, 311 MAL 2002 (Pa. 2002).

Martinolich filed a writ for habeas corpus on or about August 27, 2003, asserting that he is entitled to relief due to ineffective assistance of counsel. Specifically, he alleges that his trial counsel erred in failing to 1) present forensic testimony of ballistics expert Richard Rafter as an exculpatory defense witness and cross-examine him as a prosecution witness, 2) object to the trial court's jury charge which lacked an alibi instruction, 3) object to the trial court's jury instruction allegedly relieving the prosecution's burden of proving the elements of first and second degree murder to eliminate any possibility of a manslaughter verdict, and 4) raise a Giglio violation or attempt to impeach two prosecution witnesses who may have struck deals with the prosecution in exchange for their testimony. See Pet. at (x), 7.

On October 10, 2003, the Respondent filed its response, arguing that Martinolich is not entitled to federal habeas relief because all his claims were either (1) procedurally defaulted due to failure to thoroughly exhaust at the state level or (2) without merit. This court referred the matter to the Magistrate Judge for an R&R. The Magistrate Judge entered the R&R on March 2, 2004 recommending dismissal of the petition with prejudice.

III. Summary of Magistrate Judge's Report and Recommendation

In the R&R, the Magistrate Judge concluded that this habeas corpus petition should be dismissed because Petitioner's claims are either procedurally defaulted or without merit. R&R at 4, 11. The Magistrate Judge concluded that part of Petitioner's third claim and his entire fourth claim, alleging ineffective assistance of counsel in failing to respectively challenge the trial court's jury instructions and raise a <u>Giglio</u> violation as he directed, are procedurally defaulted. Because Petitioner conceded that he first raised these issues in his <u>pro se</u> briefs filed on appeal in the Superior and Supreme Courts of Pennsylvania, and could not demonstrate either cause for the default and actual prejudice or that failure to consider these claims would result in a fundamental miscarriage of justice, the Magistrate Judge concluded that these claims are not properly subject to federal habeas review. R&R at 4-5.

For Petitioner's remaining exhausted claims, the Magistrate Judge concluded that Martinolich failed to establish state court error in making determinations "contrary to," or that were an objectively "unreasonable application" of, clearly established federal law. Based on the well-established, strong presumptions that (1) a trial court's factual determinations are correct and (2) counsel's conduct falls within the wide range of reasonably professional assistance, as well as on Petitioner's failure to present clear and convincing evidence to contradict the relevant state court findings, the Magistrate R&R recommended that Petitioner's exhausted claims be dismissed with prejudice. R&R at 6-11.

IV. Summary of Petitioner's Objections and the Response

In his objections to the R&R, Petitioner reasserts his ineffective assistance of counsel claims. He denies that any part of his third and fourth claims regarding the jury instruction on reasonable doubt and the alleged <u>Giglio</u> violation are procedurally defaulted, based on the

explanation that he raised these issues in his <u>pro se</u> PCRA appeals, which was the first opportunity he had to do so when he was no longer represented by complained-of counsel. Pet.'s Objections at 1-3. In addition, Petitioner reasserts his actual innocence, asserting that a reasonable jury in a trial free of prejudicial errors would have found him innocent. <u>Id.</u> at 4-6. Notably, however, Petitioner fails to cite any part of the record to substantiate his actual innocence argument. In response, the Respondent argues that Petitioner never raised the alleged <u>Giglio</u> violation during any state court proceeding, even though he raised other ineffectiveness of counsel claims in his <u>pro se</u> PCRA petition. Thus, the state appellate courts were procedurally barred from considering the issue, as is the federal court for the instant habeas petition. Resp.'s Brief at 3-5. Moreover, the Respondent contends that Petitioner has failed to meet the legal standards for the only exception permitting review of procedurally defaulted claims: cause and prejudice or miscarriage of justice through actual innocence. Id. at 6-7.

With regard to the other, exhausted ineffective assistance of counsel claims, Petitioner reargues them on the merits. Pet.'s Objections at 9-12. The Respondent defers to the complete discussion of the issues' merits in its original response to the habeas petition, arguing that none of Petitioner's claims are entitled to federal habeas relief for the reasons stated therein. Resp.'s Brief at 10.

V. Discussion

The Court has carefully reviewed the Magistrate Judge's analysis of Petitioner's various state and federal filings and the relevant federal habeas corpus legal principles set forth by 28 U.S.C. § 2254 and relevant caselaw.

A. <u>Petitioner's claims of ineffective assistance of counsel for failing to challenge the trial court's jury instructions on murder and failing to raise alleged *Giglio* violations are not exhausted.</u>

Pursuant to 28 U.S.C. § 2254(b)(1), a petitioner is not entitled to have his claims reviewed by a federal court until he has exhausted all means of available relief under state law by fairly presenting each claim to the state's highest court. O'Sullivan v. Boerkel, 526 U.S. 838, 846-47 (1999); Doctor v. Walters, 96 F.3d 675, 578 (3d Cir. 1996). This doctrine provides states with the "initial opportunity to pass upon and correct alleged violations," and therefore serves important comity interests. Id. at 844-45; Duckworth v. Serrano, 454 U.S. 1, 3 (1981). Importantly, even where a petitioner has not fairly presented a claim to the state courts, the procedurally defaulted claim will be deemed technically exhausted if state procedural rules prevent the petitioner from seeking further relief in state court, leaving him with no available state remedy. O'Sullivan, 526 U.S. at 848. However, federal courts will only review this procedurally defaulted claim if the petitioner establishes "cause and prejudice," or a fundamental "miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 749-50 (1991).

There is no dispute that Petitioner failed to exhaust two of his ineffective assistance of counsel claims by not raising them on direct appeal or in his initial PCRA petition – namely, the part of his third claim regarding the jury instruction on reasonable doubt and his entire fourth claim respecting an alleged <u>Giglio</u> violation. There is also no dispute that no state review remains available and that these claims are procedurally defaulted. The question remains, therefore, whether Martinolich can establish "cause and prejudice" or a fundamental "miscarriage of justice," thereby entitling him to federal review of these claims.

It is well-established that to show cause, a petitioner must demonstrate that an "objective factor external to the defense impeded counsel's efforts to comply with the State's procedural

rule." <u>Id.</u> at 753; <u>Murray v. Carrier</u>, 477 U.S. 478, 488 (1987); <u>Sistrunk v. Vaughn</u>, 96 F.3d 666, 675 (3d Cir. 1996). Meanwhile, to establish prejudice, the petitioner must show that the error "worked to [his] *actual* and substantial disadvantage." <u>United States v. Frady</u>, 456 U.S. 152, 170 (1982) (emphasis in original). Alternatively, procedurally defaulted claims are subject to federal review if the petitioner can demonstrate that failure to consider these claims would result in a fundamental miscarriage of justice. This second exception requires the petitioner to show that "it is more likely than not that no reasonable juror would have convicted him" in light of reliable, new evidence not offered at trial, thereby establishing "actual innocence." <u>Calderon v. Thompson</u>, 523 U.S. 538, 559 (1998); <u>Schlup v. Delo</u>, 513 U.S. 298, 324 (1995).

Martinolich has argued only that the latter exception applies to his case. However, the Magistrate Judge properly concluded that Martinolich failed to supplement his assertion of innocence with any reliable, supporting evidence, and, therefore, Martinolich has not demonstrated a "miscarriage of justice" that would excuse his procedural default and entitle him to federal review. R&R at 4-5. Moreover, the United States Supreme Court has clearly emphasized that neither federal nor state courts are obligated to provide relief for claims based on ineffectiveness of PCRA counsel. Pennsylvania v. Finley, 481 U.S. 551, 557 (1987). In order to establish cause for a procedural default, ineffectiveness assistance of counsel claims must be independently presented to the state courts. Murray, 477 U.S. at 489. In sum, the Magistrate Judge correctly reached, and the record supports, the conclusion that Martinolich (1) failed to present these claims in the state courts and (2) has not established that either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions apply. Martinolich is therefore not entitled to federal habeas review of his procedurally defaulted claims.

B. <u>Petitioner is not entitled to relief on the merits of his remaining ineffective</u> assistance of counsel claims, even though those claims are exhausted.

To succeed on his remaining, exhausted ineffective assistance of counsel claims, under the leading Supreme Court case of Strickland v. Washington, 466 U.S. 668 (1984), Petitioner must establish both that (1) his counsel's performance was deficient and (2) the allegedly deficient performance prejudiced the petitioner. In conducting this analysis, courts must be "highly deferential," strongly presuming that counsel's conduct falls within the "wide range of reasonable professional assistance." Id. at 689. Courts should not second-guess strategic decisions made by counsel unless they were objectively unreasonable and the habeas petitioner can show that, absent counsel's error, the decision reached by the factfinder is reasonably likely to have been different Id. at 690, 694. Counsel is not ineffective for "failing to raise a meritless claim." Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000).

Martinolich's first exhausted ineffective assistance of counsel claim alleges that trial counsel was ineffective for not presenting ballistics expert Richard Rafter as an exculpatory witness and for not cross-examining Rafter as a prosecution witness in order to show that Martinolich's gun could not fire the steel-jacketed bullets used in the murder. However, at trial, the court had directed the jury to disregard Rafter's prior testimony regarding jacketed bullets in its entirety as irrelevant since "no expended bullets were recovered from the victim's body or around the murder scene." Martinolich, 321 MDA 2001 at 5-6. Moreover, Martinolich failed to present evidence to the contrary in either his initial habeas writ or his objections to the R&R. As a result, in the R&R's Strickland analysis, the Magistrate Judge correctly concluded that Petitioner's counsel was not ineffective for failing to raise this meritless claim, nor did the trial court unreasonably apply federal law.

Petitioner's second claim alleges that trial counsel unreasonably failed to object to the trial court's jury charge, which did not include a standard alibi jury instruction. The record does not support this invocation of the ineffective assistance of counsel doctrine. The Superior Court denied the claim because Martinolich's own testimony placed him in the vicinity of the murder scene, citing the Pennsylvania Supreme Court decision in Commonwealth v. Kolenda, 676 A.2d 1187, 1190 (Pa. 1996), which defined an alibi defense as one placing "the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party." Martinolich, 321 MDA 2001 at 6-7. In his objections to the R&R, Petitioner merely reasserts that he was entitled to an alibi instruction regardless of his proximity to the crime scene. However, Petitioner has failed to present any new evidence contradicting the state court's factual findings concerning Petitioner's presence in the vicinity of the murder. Likewise, Petitioner has failed to show how the state courts unreasonably applied federal law in finding that his counsel was not ineffective for failing to object to the jury charge. Thus, the Magistrate Judge appropriately applied <u>Strickland</u> and correctly found that this claim was without merit.

Finally, Martinolich contends that his trial counsel erred in failing to object to the jury instruction on reasonable doubt, which Petitioner alleges relieved the prosecution's burden of proving the elements of first and second degree murder. It is well-established that a jury charge must be evaluated on a commonsense basis as a complete whole, not in isolation. Henderson v. Kibbe, 431 U.S. 145, 153 (1977). Rather than showing merely that the instruction was "undesirable, erroneous, or even 'universally condemned," Petitioner must show that "the ailing instructions by themselves so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). Although a petitioner is entitled to

habeas relief where the jury instruction overstates the amount of doubt required for acquittal, <u>In</u> <u>re Winship</u>, 397 U.S. 358, 368 (1970), the jury instruction here provided no such explicit misdirection and in fact emphasized that Petitioner was innocent until proven guilty by the prosecution. Habeas Pet., Exhibit F at 711.

Petitioner's objections to the R&R merely reassert this claim without providing any further factual or legal support. Martinolich merely alleges that the R&R failed to address the part of his claim alleging that the jury instruction precluded any possibility of a manslaughter verdict. However, in <u>United States v. Frady</u>, the United States Supreme Court rejected a similar claim that a set of jury instructions precluded a finding of manslaughter. The Court emphasized that where there is "malice aplenty" in the record and the petitioner fails to present new, reliable evidence to establish actual prejudice, the petitioner cannot establish that, absent the challenged instruction, the crime of which petitioner would have been convicted would only have been manslaughter. <u>Frady</u>, 456 U.S. at 171-74.

Accordingly, the Superior Court and the Magistrate Judge correctly opined that the trial court did not err in instructing the jury that the prosecution must prove each and every element beyond a reasonable doubt arising out of the evidence, and in finding that Martinolich has not met the required burden to demonstrate actual prejudice as a result of the challenged instruction.

Martinolich, 321 MDA 2001 at 8; R&R at 10. Martinolich is therefore not entitled to federal habeas relief on this claim.

C. <u>Petitioner's request to reconsider his petition for appointment of counsel is</u> moot.

Because Martinolich has not demonstrated that he is entitled to federal habeas relief based on any of his claims, his petition requesting this Court to reconsider appointing him counsel is moot and therefore need not be considered. Moreover, the Court notes that the record in this case does not reflect any inability on the part of Petitioner to understand the issues. To the contrary, Petitioner filed a 50 page habeas petition and 12 pages of objections to the R&R, each of which coherently presented his claims and discussed relevant law. The Court therefore also finds that, even were the issue not moot, appointment of counsel is not warranted in this case. See Reese v. Fulconer, 946 F.2d 247, 263-64 (3d Cir. 1991) (emphasizing the district court's discretion in denying appointment of counsel in habeas proceedings).

VI. Conclusion

All of Petitioner's claims are either procedurally defaulted or without merit.

Accordingly, for the reasons stated by the Magistrate Judge, and based on the foregoing discussion, the Petition for Writ of Habeas Corpus will be denied with prejudice. Furthermore, there is no compelling reason to grant Martinolich's Petition to Reconsider Appointment of Counsel Pursuant to Section 1915 (d), which the Court will deny as moot.

An appropriate order follows.

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Respondents.

ORDER

AND NOW, this day of August, 2006, upon careful and independent consideration of the pleadings and the record herein, and after review of the Report and Recommendation of James R. Melinson, Chief United States Magistrate Judge, it is hereby ORDERED as follows:

- 1. The Report and Recommendation is APPROVED AND ADOPTED.
- 2. The Petition for Writ of Habeas Corpus (Doc. No. 1) is DENIED with prejudice.
- 3. There is no probable cause to issue a certificate of appealability.
- Petitioner's Petition to Reconsider Appointment of Counsel Pursuant to Section
 1915 (d) (Doc. No. 17) is DENIED AS MOOT.
- 5. The Clerk shall close this case.

BY THE COURT:

/s/ MICHAEL M. BAYLSON Michael M. Baylson, U.S.D.J.